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constitutional enactment, and are not coincident with the distinction between actions in rem and in personam.

R. C. F.

SPECIFIC PERFORMANCE: PART PERFORMANCE OF PAROL CONTRACTS TO CONVEY LAND.—Part performance will take a parol contract for the conveyance of land out of the statute of frauds. This doctrine, enunciated in England within a decade after the passage of the original statute,¹ is well established in most jurisdictions and is incorporated into the statute of frauds in California.² The difficulty lies in determining what acts constitute a part performance.

*Woerner v. Woerner*³ announces that the relinquishment of property rights by one party to an oral contract to convey land is not a sufficient part performance. The plaintiff had performed her part of an oral agreement whereby she was to give up all her rights in other community or separate property and her right to any further allowance of alimony, costs, and counsel fees in a divorce suit in consideration that the defendant convey to her certain land and pay her three thousand dollars. The husband paid the money, but refused to convey the land and the wife did not take possession. The court, in refusing specific performance, pointed out that the giving of full consideration is not, of itself, a sufficient part performance and that the plaintiff had an adequate remedy by an action to recover the value of the rights she had relinquished. These grounds are quite uniformly recognized as adequate for denying the equitable relief of specific performance.⁴ Nevertheless, it is rather hard to see just how the damage to the wife could be accurately determined in a suit at law, and some courts have granted specific performance in cases where a plaintiff had compromised or dismissed an action in consideration of an oral promise by a defendant to convey real estate.⁵ In California, however, change of possession seems to be essential to take the case out of the statute. In those cases where specific performance of parol contracts to convey land has been decreed in this state, the vendee had taken possession of the land in

¹ *Butcher v. Stapely* (1685), 1 Vern. 363, 23 Eng. Rep. R. 524. Cases in accord therewith are collected in 1 Ames' Cases on Equity, 279. See also 4 Columbia Law Review, 294 and 14 Harvard Law Review, 64.

² Cal. Civ. Code, § 1741; Cal. Code Civ. Proc. § 1973.

³ (Nov. 4, 1915), 50 Cal. Dec. 465, 152 Pac. 919.

⁴ Pomeroy, Specific Performance, 2d ed., § 106 and cases cited; 36 Cyc. 650; *Fulton v. Jansen* (1893), 99 Cal. 587, 34 Pac. 331; *Forrester v. Flores* (1883), 64 Cal. 24, 28 Pac. 107.

⁵ 36 Cyc. 678; *Slingerland v. Slingerland* (1888), 39 Minn. 197, 39 N. W. 146; *Barbour v. Barbour* (1892), 49 N. J. Eq. 429, 24 Atl. 227; *Hancock v. Melloy* (1898), 187 Pa. St. 371, 41 Atl. 313; *Paine v. Wilcox* (1862), 16 Wis. 215.

pursuance of the contract.⁶ True there were additional acts of part performance in these cases, such as the making of improvements on the land, and the court looked with favor upon these re-enforcing equities. But possession seemed to be the most important factor, and there are strong dicta to the effect that change of possession alone will take the case out of the statute of frauds.⁷ On the other hand, specific performance has been denied in cases where one party to an oral agreement surveyed⁸ or cut wood from⁹ the land bargained for, but did not take actual possession. The present case goes farther than these, for the plaintiff here had given up more valuable rights and could not easily be replaced in her former position. It has been said in judicial decisions outside of California that possession is an indispensable element in the part performance of a verbal contract to convey land.¹⁰ The principal case indicates that such is the attitude of the California courts.

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⁶ Possession was taken and certain additional acts were done in the following cases: *Meredith Oil Co. v. Dunham* (1907), 5 Cal. App. 367, 90 Pac. 469 (oil tanks erected); *Moulton v. Harris* (1892), 94 Cal. 420, 29 Pac. 706; *Flickinger v. Shaw* (1890), 87 Cal. 126, 25 Pac. 268 (ditch constructed); *Calanchini v. Branstetter* (1890), 84 Cal. 249, 24 Pac. 149 (land cleared); *Burlingame v. Rowland* (1888), 77 Cal. 315, 19 Pac. 526 (land cultivated and house moved thereon); *Day v. Cohn* (1884), 65 Cal. 508, 4 Pac. 511 (buildings erected); *McCarger v. Rood* (1873), 47 Cal. 138 (land plowed); *Hoffman v. Fett* (1870), 39 Cal. 109 (mine developed); *Arguello v. Edinger* (1858), 10 Cal. 150; *Tohler v. Folsom* (1850), 1 Cal. 207. In Massachusetts, Texas, and the federal courts, something more than change of possession is required to constitute a sufficient part performance: *Burns v. Daggett* (1886), 141 Mass. 368, 6 N. E. 727. See footnotes, I Ames' Cases on Equity, 286-288.

⁷ *Calanchini v. Branstetter* (1890), 84 Cal. 249, 253, 24 Pac. 149; *Arguello v. Edinger* (1858), 10 Cal. 150, 160.

⁸ *Edwards v. Estell* (1874), 48 Cal. 194; *Niles v. Hancock* (1903), 140 Cal. 157, 163, 73 Pac. 840.

⁹ *Fulton v. Jansen* (1893), 99 Cal. 587, 34 Pac. 331.

¹⁰ *Ackerman v. Fisher* (1868), 57 Pa. St. 457, and other cases cited in Pomeroy, Specific Performance, 2d ed., § 117.